IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO. 4565 OF 2007

Mannampone C. Sunny .... Petitioner

versus

Shartech Construction Company
and others ..... Respondent.

Mr. P.S. Dani for the petitioner.
Mr. R.B. Chaudhari i/b. Anilkumar patil for the respondents.

CORAM; A.P. DESHPANDE, J.
DATED; 21ST AUGUST, 2007

P.C.;

1. Rule. Rule made returnable forthwith. Heard finally by consent of parties.

2. The respondent no.1 filed a suit for specific performance of agreement against defendant nos. 1 to 10 who are respondent nos. 2 to 11 in this petition. A further relief is sought that the agreement executed by respondent nos. 2 to 11 in favour of the present petitioner is illegal. The respondent no.1 averred in the plaint that it is a registered partnership firm, having two partners. The relevant averments in the plaint are in paragraph 1 which reads thus:

> "That the plaintiff is a registered partnership firm consisting of two partners. viz. Shri A.V.Balkrishnan and Shri Subrata Kumar Nayak engaged in civil construction and development as well as engineering business."

The present petitioner, who is defendant no.11 in the suit, filed a written statement and in the reply to the averments reproduced hereinabove, said thus:

> "The defendant submits that the defendant is not aware that the plaintiff is registered partnership firm and/or the persons named therein viz. Shri A.V.Balkrishnan and Shri Subrata Kumar Nayak, are the partners of the said firm".

3. The respondent no.1/plaintiff being conscious of the provisions of section 69(2) of the Indian Partnership Act placed on record of the case, three documents with a view to establish that the plaintiff is a registered partnership firm. The documents placed on record are (1) receipt showing the production of the deed of partnership for registration at Exh.67 (2) an extract of certificate issued by the

Registrar of Firm showing t Shri A.V.Balkrishnan and Shri Subrata Kumar Naik as partners of the firm, indicating that the registration has been granted on 16-8-1995 and (3) final certificate of registration is also placed on record as Exh.69. The respondent no.1 has proved the said documents indicating that the respondent no.1 is a registered partnership firm and the names of the partners are so registered with the Registrar of the Firms. The plaintiff after examination of six witnesses closed the evidence. So also the present petitioner after examination of their witnesses closed the evidence. However, thereafter the present petitioner moved an application for amendment of the written statement contending that a legal contention has remained to be taken in the written statement and hence the amendment was proposed which is to the effect, that on the date of the institution of suit, the plaintiff partnership firm was not registered and in view of the non registration of the plaintiff firm, the plaintiff's suit is not maintainable. It is then stated in the amendment application that the petitioner does not want to lead any evidence, and what is required to be done is only perusal of the documents already placed on record by the plaintiff in the light of provision of section 69(2) of the Indian Partnership Act. The application was opposed by the respondent no.1/plaintiff by

submitting that when the matter was fixed for argument, belatedly the amendment application has been filed. It is then submitted that there is no specific denial of the averments made in para 1 of the plaint. It is also stated that the evidence of both the sides is already over and hence application ought not to be granted.

4. The trial court has rejected the application and aggrieved thereby the present writ petition has been filed. The application for amendment is opposed on three grounds: (1) that the application has been filed belatedly when the suit was fixed for final argument, (2) that the amendment is inconsistent with the provisions of Order 6 Rule 17 and (3) that the petitioner should have raised this objection at the earlier stage of the suit. The trial court has rejected the application after appreciating the documents at Exhs. 67, 68 and 69 by recording a finding that it appears that the plaintiff is a registered partnership firm. The trial court then proceeds to observe that no objection has been taken by the counsel for the present petitioner/defendant no.11 while exhibiting the above said documents. It appears from the impugned order that the trial court did not properly understand the purpose behind the proposed amendment. The petitioner has categorically

stated that he does not want to lead any evidence and the relevant evidence has come on record viz. the certificate of registration of the firm, which, if properly perused would indicate that the plaintiff's firm was not registered at the time of filing of the suit, however, it came to be registered during pendency of the suit. By the proposed amendment what is sought to be contended is that on the date of filing of the suit, the plaintiff's firm was not a registered partnership firm and thus the suit is hit by section 69(2) of the Partnership Act. The said aspect has not been considered in proper perspective by the trial court.

5. No doubt the application has been filed belatedly. It is also clear that the petitioner did not specifically deny the averments made in the plaint, about the partnership firm being a registered partnership firm. However, in the written statement, it is contended that the present petitioner is not aware about the registration of the firm or the partners of the firm, the fact being exclusively within the knowledge of the plaintiff.

6. In the above factual matrix the learned counsel for the petitioner has submitted that the suit in question has been filed prior to the amendment of 2002

in Order 6 Rule 17 and hence the application has to be considered at the touchstone of the unamended provision. It is then contended that bare perusal of section 69(2) would reveal that "no suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm." In the submission of the learned counsel sub section (2) of section 69 is self operating and the court is obliged to consider the mandate of sub section (2) whether the defendants specifically denies the registration or otherwise. The bar of section 69(2) need not even be pleaded, is his further submission. It is contended by the learned counsel that the amendment is sought only with a view to raise a legal plea which could be raised even in an appeal. However, by way of an abandoned precaution, the amendment application has been moved before the trial court, so that if the plaintiff wants to substantiate the fact that the partnership firm was registered on the date of filing of the suit, the plaintiff can be permitted to do so. It is submitted that assuming that the plaintiff has not placed on record all the relevant documents to indicate that the partnership firm was registered on the date of filing of the suit, the petitioner has no objection to permit

the plaintiff to lead further evidence. It is also submitted that the petitioner does not want to lead any evidence whatsoever. On this premise, it is claimed that the amendment application though belatedly filed need to be allowed in the interest of justice.

7. Per contra, the learned counsel for the respondent has submitted that had this plea been taken at the first possible opportunity, the same would have avoided delay, inconvenience and hardship to the plaintiff. It is pointed out that the plaintiff's suit is pending since the year 1995, hence the trial court has properly rejected the amendment application. Perusal of the unamended Order 6 Rule 17 leaves no room of doubt that the amendment application can be allowed at any stage. The position in law appears to be settled that a partnership firm if not registered on the date of filing of the suit cannot institute a suit in the teeth of section 69(2) and thus the proposed amendment is very vital in adjudicating the question of very maintainability of the suit.

8. I am of the clear view that the proposed amendment, if allowed, would go to determine the real question in controvery. However, with a view to avoid

any prejudice being caused to the plaintiff, the plaintiff shall be permitted to lead additional evidence to substantiate the fact thqt the plaintiff was a registered partnership firm on the date of filing of the suit. The amendment application thus deserves to be allowed in the interest of justice. Impugned order passed by the trial court is quashed and set aside. Amendment application is allowed. Rule made absolute in above terms.

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